IN THE

Supreme Court of the United States.

NUMBER 169 OF OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY,
Defendant in Error.

Collins Case.

BRIEF FOR DEFENDANT IN ERROR.

Facts.

FIRST HEAD: *Condition and Nature of the Action.*

Writ of error to the Circuit Court of Appeals for the Second Circuit, bringing up a judgment of that court which affirmed a judgment of the Circuit Court for the Southern District of New York, a judgment for money entered upon a verdict of a jury, which had been rendered in favor of the plaintiff below.

The action was brought upon a paper writing under seal, called therein a "Bond," made by the

plaintiff in error, by which it bound itself to "make good and reimburse to the" California National Bank, "all and any pecuniary loss sustained by" it, "of moneys, securities, or other personal "property in the possession of" one John W. Collins, its president, "or for the possession of "which he is responsible, by any act of fraud, or "dishonesty, on" his "part, in connection with "the duties of the office or position hereinbe- "fore referred to," * * * * and "occurring "during the continuance of this Bond, and dis- "covered during said continuance, or within six "months thereafter, and within six months from "the death or dismissal, or retirement of" said Collins "from the service of the" employer. The paper writing also contained the following: "It "being understood that a written statement of "such loss, certified by the duly authorized officer "or representative of the Employer, and based "upon the accounts of the Employer, shall be "*prima facie* evidence thereof" (fols. 29–30).

Also the following:

"That the company shall be notified in writing "at its office, in the City of New York, of any "act on the part of the Employee, which may in- "volve a loss for which the Company is responsible "hereunder, as soon as practicable after the occur- "rence of such act shall have come to the knowl- "edge of the Employer. That any claim made in "respect of this Bond shall be in writing, addressed "to the Company, as aforesaid, as soon as practi- "cable after the discovery of any loss for which "the Company is responsible hereunder, and with- "in six months after the expiration or cancella- "tion of this Bond as aforesaid" (fols. 32–3).

It was also provided in this paper writing, that its term should be for twelve months, ending on the first day of July, 1892, at noon (fol. 29), and that the plaintiff in error should not be responsible under it to a greater amount than twenty-five thousand dollars (fol. 34).

The defendant in error is receiver of the concerns of the California National Bank.

An issue made by a complaint which alleged loss from acts of Collins insured against as above and an answer denying the same, was tried to a jury which rendered a verdict in favor of defendant in error for twenty-five thousand dollars, with interest from three months after notice had been given.

The judgment entered upon that verdict was affirmed by the Court of Appeals for the Second Circuit, and the judgment of the latter court is now brought here.

Second Head: *The Proofs.*

As to the acts of dishonesty and the loss.

On the morning of the thirteenth of October, 1891, John W. Collins, then and for a long time before president of the bank, owed the bank about three hundred thousand dollars—to be exact, $301,728.22.

This is got at from the proof as follows:

His indebtedness on the twelfth of November was $374,978.22 (fol. 621).

Less credits of 13 and 14 October (fols. 267–270)	$45,000	
Less other credits to 10 November (fol. 677)	$28,250	73,250.00
		$301,728.22

The Court should be informed that there are misprints in the dates of the two accounts printed on pages 181 to 209 and 223 to 228. On page 185 the date "1893" should be 1891. On pages 186, 187, 188, 189, 190 and 191, the six dates "1890" should be each 1889. On page 192 the first date "1890" should be 1889. On pages 185 and 186 the "1890" should be 1891. In other words, the account should run consecutively from 19 Jan. 1888, at page 181, to 10 November, 1891, at page 209. On the other account, on page 225 the

"1892" should be "February," and the "1893" should be "March." On page 226 the "1893" should be "March," the 1894 should be April, the 1895 should be "May" and the 1896 "June." On pages 227 and 281 the two dates "1887" should each be 1891. In other words the account should run consecutively from the first of November, 1890, on page 222, to January, 1892, on page 228. The mistake in the Collins account has come from the fact that the months are numbered in the original "2" for February, "3" for March, and so on, and the printer has prefixed "189" for March, and so on. All this appears by a glance at the original bill of exceptions.

This indebtedness consisted of (fols. 448–453):

1. Notes $57,697.37
2. Cheques not charged 75,616.25

$133,313.62

And the balance, mostly by crediting to Collins' private deposit account in the bank of moneys borrowed by the bank elsewhere, and *its* property, not *his*, under circumstances similar to those now to be narrated.

On the 12th of October, 1891, Collins, in New York, borrowed for the California National Bank of the Western National Bank, on paper of the California Bank, $20,000, and that amount was placed to the credit of the California National Bank in its deposit account in the Western National, and was afterwards chequed out by the California Bank (fols. 227–233, 464). On the thirteenth of October the cashier in San Diego made out a deposit slip to credit Collins $20,000, stating on the slip to be "Westn. Nat." (fols. 167, 435), the slip being in the cashier's handwriting (fol. 170). From this deposit slip, or "tag," as he called it, the bookkeeper posted into the ledger to Collins' credit in the latter's individual account the same amount of $20,000 (fols. 171, 155, 677). A telegram in cipher had previously on that day passed from Collins in New York to the cashier in San Diego (fol. 622).

On the 12th and 13th days of October Collins, in New York, borrowed for the California National Bank of the United States National Bank in New York, first, $7,595.27, on two rediscounted bills, which the California National Bank had discounted; and, secondly, $17,316.25 on the note of the California National with six of the latter's discounted bills as collateral. The total proceeds, $24,911.52, were placed to the credit of the California National in its deposit account in the United States National, and were afterwards chequed out by the former (fols. 234, 239, 468). On the 13th of October the cashier in San Diego made out a deposit slip to the credit of Collins for $24,500, writing on it "U. S. Nat., N. Y.," and on the 14th another for $500, writing on that "more U. S. Nat.," and those amounts were posted to Collins' credit in the latter's individual account in the California Bank, both deposit slips being in the cashier's handwriting (fols. 433, 434, 155, 166–172, 677). There was a telegram in cipher referring to one of these from Collins to the cashier on that day (fol. 623).

The above were the "acts of fraud or dishonesty" on the part of Collins which the court submitted to the jury. The plaintiff's claim was that Collins had deliberately put forty-five thousand dollars of the bank's money to his own credit, and then drew out the money.

As bearing upon his knowledge and intent the plaintiff gave evidence of the following transactions:

On the twenty-fifth of March, 1891, Collins borrowed for the California Bank of the Park Bank in New York twenty-five thousand dollars, which was placed to the credit of the California Bank in the Park Bank and chequed out by the former

(fols. 219–223, 245), and this amount was put to Collins' credit in the California Bank (fol. 454).

On the twenty-fifth of March, 1891, twenty thousand dollars was put to his credit which had been borrowed of the Union National of Chicago (fol. 625).

Prior to the twenty-first of April an arrangement to deceive the bank examiner had been made between the California Bank and the National Bank of Commerce of Kansas City, by which the latter bank was apparently to loan monies to the former, so that the books would show a deposit—but the California Bank was not to draw against it; under this arrangement a loan of twenty thousand dollars was made on the sixteenth of April, none of which, of course, was ever drawn by the California Bank (fols. 250–255); under color of this twenty thousand dollars was put to Collins' credit on the twenty-first of April, 1891 (fols. 273–274, 479).

On the second of May, 1891, forty thousand dollars was put to Collins' credit by simply making an "item"—that is, putting a piece of paper in the cash (fols. 455, 353–9).

On the twenty-fifth of May, 1891, the cashier made out to Collins three certificates of deposit—one for $10,000 and two for $7,500 each (fols. 475–478), and took Collins' cheque therefor (fol. 448), which cheque he did not charge to Collins' account (fol. 188). Collins used these certificates as collateral to effect a loan to the same amount, $25,000, from one Wood in Denver (fols. 240–245). The draft in which the proceeds were given to him he used in the Denver National Bank; $5,115.25 of it to pay a debt of his own, and the balance of $19,883.75 he put to the credit of the California National there (fols. 246–9). The above cheque (Exhibit 6)

stands therefore for an indebtedness of $5,116.25 only.

On the sixth of June, 1891, the cashier put to the credit of Collins in the California National $20,000, writing on the deposit slip, "By Teleg., Nat. Park Bk." (fol. 459), and this amount was posted to the credit of Collins in his individual account in the ledger (fol. 218). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 460), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 224–5), and the California Bank drew out the money.

On the twentieth of July, 1891, the cashier gave Collins a certificate of deposit for $20,000, and took Collins' cheque therefor, which he never charged up against the latter (fols. 449, 189).

On the sixteenth of September, 1891, he gave Collins a certificate of deposit for $15,000 and took Collins' cheque therefor, which he never charged up against the latter (fol. 189).

On the twenty-second of September, 1891, he gave Collins two certificates of deposit for $7,500 and $8,500, for which Collins gave his cheque, which was never charged up against him (fol. 187).

Here were on the morning of the twelfth of October one hundred and twenty-five thousand dollars of false deposits, as follows:

25 March.....	$25,000
" "	20,000
21 April.....	20,000
2 May.....	40,000
6 June.....	20,000
	$125,000

and seventy-six thousand dollars of certificates of deposit, issued for nothing:

23 May.....	$10,000
" "	7,500
" "	7,500
20 July.....	20,000
16 Sept.....	15,000
22 Sept.....	7,500
" "	8,500
	$76,000

which we know of.

Here is a deliberate taking by Collins of two hundred and one thousand dollars of the bank's money, embracing twelve false transactions.

And it may be, that had the other deposit slips used upon the trial (fol. 218) been printed, other false deposits would appear.

No denial was made.

In addition to the above there are the transactions of the thirteenth and fourteenth October—$45,000—on which the Court sent us to the jury, and on the 31st October O'Brien put to Collins' credit $20,000, writing on the deposit slip

"Check 1st Chic.....	$10,000
" West Natl.....	10,000
	$20,000"

(fol. 677), and charged those two banks corresponding amounts; this was purely imaginary (fol. 325).

Collins drew out all of this money—the balance to his credit in his deposit account being on the eleventh November, when the bank closed, $10,420.90 (fol. 678), and against this there were two cheques to be charged amounting to $19,850, which

the bank examiner did afterwards charge (fols. 160, 678).

There is no doubt about this proof. Mr. Pauly, as early as the eighteenth of July, 1892, sent to the plaintiff in error a detailed account showing that Collins owed the bank when it closed $374,978.22 in his own name (fols. 514, 535–621), and claiming also that under the name of Dare and Collins he further owed the bank $348,703.52 (fol. 515). The expert Bloodgood swore to the fact. The plaintiff in error sent an expert accountant to San Diego in July, 1893, and August, 1894 (fol. 334). He was given full access to all the books (fol. 334). They put him upon the stand and he did not question one word of the foregoing (fol. 334), and in all their cross-examination of the expert Bloodgood they only questioned one item of $10,000 (fol. 325).

II.—*As to the Discovery, Notice and Claim.*

The assets of the bank were taken possession of by the bank examiner on the thirteenth of November, 1891. Mr. Pauly was qualified as receiver on the twenty-ninth of December, 1891.

The receiver notified the plaintiff of acts of fraud and dishonesty on the part of Collins on the twenty-third of May, 1892.

Mr. Pauly says that his discovery was made by the report to him of an expert by the name of Sparks (fols. 30–31, 297). Sparks was employed by him on the first of April, 1892—not before—(fols. 257–8), and continued until the first of June.

Mr. Bloodgood assisted him (fols. 257–8).

Some days before the twenty-third of May they discovered the acts of Collins of the thirteenth and fourteenth of October, as already given, and made

a written report about them to Mr. Pauly (fols. 257–260, 482–490).

He thereupon on the twenty-third of May wrote to the plaintiff in error that "a discovery of fraud "had been made of a sufficient amount to require "the payment of the" amount of the bond, and asking for a blank to prepare the claim (fol. 491). To this the plaintiff in error responded by the letter which is printed at folio 505—sending the blank. This letter was received by Mr. Pauly about the eighth or ninth of June. But without waiting for the reply Mr. Pauly had sent the detailed notice or claim on the thirty-first of May (fols. 492–504). On the twenty-fourth of June Mr. Pauly sent the letter printed at folio 695, enclosing the claim (fol. 596), and the notice (fol. 698). This was received by the plaintiff in error, and on the eighth of July it wrote to Mr. Pauly, acknowledging its receipt, not objecting to the proof of claim at all, but asking for full information as to the shortage and credits of both Collins and O'Brien (fol. 505). To this, on the eighteenth of July, Mr. Pauly responded, by sending the Collins account, given at folios 535–621 (fol. 514). Correspondence followed between the parties, continuing until the fourth of October (fols. 514–534), mainly relating to the going of an expert, whom the Surety Company intended to send to examine into the matters, and giving excuses why his going had been delayed. He had to go elsewhere upon its other matters, and had not got there as late as the fourth of October.

Mr. Pauly says in his proof of loss, which is made evidence by the contract (fols. 30–31) that, being advised that J. W. Collins was thought to have embezzled, etc., he employed an expert ac-

countant to enter upon an examination of the books of the bank. That "*such investigation*" showed the acts of Collins in question (fols. 497, 422).

This expert was Sparks (fol. 297).

Now, we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 257–8). The payments to Sparks show this beyond question. We also know the report of Sparks, in which Bloodgood joined, was not made to Mr. Pauly until a very few days before the twenty-third of May (fols. 259–260).

Sparks went to work April first, on Collins' account and with Bloodgood assisting him—they "worked all the time constantly, and worked hard" (fol. 257)—discovered the acts of Collins, on which we went to the jury in this action, some time in May (fol. 258). They embodied a description of those acts in a written report to Mr. Pauly, which they gave to him shortly before the twenty-third of May (fol. 260). This report is printed in the Transcript of the Record at fols. 482–490. It describes the acts in question at fols. 486–7.

The defendant below made a motion for a nonsuit and a motion that a verdict be directed in its favor It also took certain exceptions to the charge.

BRIEF OF THE ARGUMENT.

I.

The motion for a non-suit and the motion for the direction of a verdict were properly denied.

The grounds of these motions were substantially as follows:

1. *The alleged loss was not set forth in the proof of claim.*

This is based upon the idea that the "proof of claim" is a sort of pleading, and that there is a variance between that pleading and the proof.

One answer to this contention is that the "proof of claim" is not pleading, but *proof*.

The policy or bond contains the following (fols. 30–31): "It being understood that a written state-" ment of such loss, certified by the duly author-" ized officer or representative of the employer, " and based upon the accounts of the employer, " shall be *prima facie* evidence thereof."

The "proof of the claim" is, therefore, evidence, and, as the court told the jury, we could have put it in evidence and stopped, resting our case upon it. It is by the express provision of the contract *evidence* upon which a verdict will stand.

It follows that no matter how much other and variant evidence there may be, *we would have a right to go to the jury upon the difference in the proofs*. Upon this part of the case the questions must, by the express provision of the contract, always be questions of fact.

But there is not any variance.

The statement in the proof of claim is as follows:

"That on the 13th day of October, he, the said "J. W. Collins, obtained from the United States "National Bank of New York a loan of twenty-"five thousand dollars ($25,000), upon a note of "the California National Bank and by rediscount-"ing certain individual notes being of the assets "of said bank, *and took and applied said sum* "*of twenty-five thousand dollars to his individual* "*use, and embezzled said sum*" (fols. 425, 500).

Other evidence in the case tends to show that Collins effected a loan, as above stated; that the money was put to the credit of the California National in its account with the United States National; that Collins then sent a telegram to the cashier of the California National; that the cashier then put the twenty-five thousand dollars to Collins' credit in his individual account, writing on the deposit slip that the money was from the United States National Bank of New York, and Collins then chequed it out.

Surely here is no variance. It was the same money. The cashier's entry shows that it was the same money. The fact that it passed through the hands of the California National to get into Collins' hands does not make it any the less the same money, and he *did* appropriate it to his own use, and he *did* embezzle it. That it went to the credit of the California National, and then directly to *his* credit *in* that bank is but a *detail* of the embezzlement, and a showing of *the particular manner* in which he did appropriate it to his own use.

There is another answer to this point, which, though narrow and technical, is not any more narrow and technical than is the point itself. It is this:

The brief used by the plaintiff in error below, in stating this matter, after saying that the money thus borrowed had been put to the credit of the California National and drawn out "in the usual way," which is, of course, so—proceeds (pp. 16–17): "No testimony whatever was offered to show "that Collins had anything to do with drawing it "out. *The burden as to this being upon the plain-"tiff, it must be assumed that he did not.*"

On the contrary *there is* evidence. *There is the "proof of claim,"* which is evidence that Collins appropriated to his own use and embezzled *this very money.* If, in order to make out the appropriation and the embezzlement, it be necessary to show that Collins personally drew out the money, *then here is evidence that he did so.* There is none to the contrary and the verdict has determined that issue in our favor.

Indeed it is the most probable thing in the world that he did draw it out and send it to California to meet his cheques upon his individual credit. Since he was president of the bank he could easily have done this.

2. *The preliminary notice was not served, as required by the bond.*

3. *Neither the final notice nor the proof of loss, was served as required by the bond.*

4. *Assuming that some loss was proved, it would not be one within the terms of the bond.*

The first two matters will be considered together, since the notice and the claim were given and made together. The provision in the contract is in these words (fol. 33): "That the Company shall "be notified in writing, at its office in the City of "New York, of any act on the part of the Em- "ployee, which may involve a loss for which the "Company is responsible hereunder, *as soon as* "*practicable* after the occurrence of such act shall "have come to the *knowledge* of the Employer. "That any claim made in respect of this bond "shall be in writing, addressed to the Company, as "aforesaid, *as soon as practicable* after the *dis-* "*covery of any loss* for which the Company is "responsible hereunder."

What is "as soon as practicable" is a question of fact.

Angell, §§ 231, 233.

Insurance Co. *vs.* Stark, 6 Cranch, 273.

Cashau *vs.* N. W. Nat. Ins. Co., 5 Biss., 476.

O'Brien *vs.* Phœnix Ins. Co., 76 N. Y., 459.

Carpenter *vs.* G. A. Ins. Co., 135 N. Y., 389.

McNally *vs.* P. Ins. Co., 137 N. Y., 389.

Edwards *vs.* Baltimore Fire Ins. Co., 3 Gill, 176, 188.

People's Accident Assn. *vs.* Smith, 126 Penn. St., 317, 325.

In *Cashau* vs. *Northwestern Nat. Ins. Co.*, 5 Biss., 476, the contract was of reinsurance, and contained the following: "All persons having a

"claim under this policy shall proceed at once to "put the property in the best order, and give im- "mediate notice, and render a particular account "thereof in writing, under oath, stating the time, "origin and circumstances of the fire."

The fire occurred 9th October, 1871. The insurance company was made insolvent by the fire and a receiver was appointed and qualified 16th October, 1871. Proofs of loss were made by insured and served on the receiver 8th December, 1871.

On the 29th December, 1871, the receiver gave notice to the defendant that proofs of loss had been served upon him by the insured, and that he would hold the defendant liable. This was served on the president of defendant 29th December, 1871, and acknowledged by the secretary 4th January, 1872. On the 22d January, 1872, proofs of loss were served by the receiver on the defendant.

In a suit by an assignee of the receiver, the Court directed a verdict for plaintiff. On a motion for a new trial Mr. justice *Miller* refused to disturb the verdict, saying: "The word *immediate* "must mean a reasonable time under the circum- "stances" (p. 478).

It thus appears that the fire occurred on the ninth of October, 1871, and no notice of any kind was given to the insurance company until the twenty-ninth of December—a period of two months and twenty days. There was no excuse, except that the receiver was new to the business. That excuse can be urged here with equal force.

In *O'Brien* vs. *Phœnix Insurance Co.*, 76 N.Y., 459, the loss occurred the eighth of March, and the proofs were furnished the sixteenth of May—two months and eighth days.

In *Carpenter* vs. *G. A. Ins. Co.*, 135 N. Y., 298, the lapse of time was one hundred and fifteen days.

In *McNally* vs. *P. Ins. Co.*, 137 N. Y., 389, the policy provided that a certain certificate should be given "if required." The fire occurred seventh June, 1885. The certificate was "required" on the seventeenth of June, 1885. It was furnished seventh of June, 1886—ten days less than one year, and the court did not disturb the verdict of the jury.

In *Brink* vs. *Hanover Fire Ins. Co.*, 80 N. Y., 108, the court held the following question to be proper: "Q. So far as you could individually did "you get those proofs of loss forwarded as soon as "it was possible for you to do so?" In this case the policy required the proofs to be forwarded as "soon as possible." The fire occurred on the twenty-third of November. The proofs were prepared by one of the plaintiffs and forwarded to the other on the seventh of the following January, and they were given by the latter to the insurance company on the seventh of February.

Evidence was as follows:

The bank examiner took possession of the assets of the bank on the twelfth of November, 1891.

Mr. Pauly qualified as receiver on the twenty-ninth of December, 1891.

Mr. Pauly says in his "proof of loss" (which is evidence, fol. 29–30, as already observed), that being advised that J. W. Collins was thought to have embezzled, etc., he employed an expert accountant to enter upon an examination of the books

of the bank, that "*such investigation*" showed the acts of Collins in question (fols. 497, 422).

This expert was Sparks (fol. 297).

Now we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 257–8). The payments to Sparks show this beyond question. Sparks went to work the first of April upon Collins' account, and, with Bloodgood assisting him, they "worked all the time constantly and worked hard" (fol. 257); discovered these acts of Collins some time in May (fol. 258). They embodied a description of these acts in a written report to Mr. Pauly, which they gave to him shortly before the twenty-third of May (fol. 260). This report is printed at folios 482–490. It describes the acts in question (fols. 486–7).

We say that this was how and when first Mr. Pauly made his discovery.

The only evidence to the contrary is a statement in the original bill of particulars. As this was at first drawn it mistakenly stated that the acts were discovered during February and March. Under the rule of the court Mr. Pauly was required to verify the bill of particulars, and did so. We amended this upon the trial (fol. 150), but the plaintiff in error put the original statement in evidence as a declaration of Mr. Pauly (fols. 364–5).

And it is all the evidence upon this issue which they have got.

Of course the verdict has settled it.

Mr. Bloodgood on his cross-examination is made to say certain things about some of the items, which may or may not have been those in question, as of January or February which he corrected afterwards.

He was then employed in assisting Mr. Pauly in preparing his report to the comptroller. Had the plaintiff in error printed that report, which is in the bill of exceptions (fol. 363), it would intelligibly appear what he was talking about. As it is it does not so appear. The report would probably have to show what certificates were outstanding, and would therefore require the checking up of the certificate book. It would also probably have shown all balances due to and from other banks, and thus would necessitate the examination of the whole of the accounts with the United States National and the Western National, including the items in question—but that would not show that Collins got the money. It would only show that the California National got it.

The remark referred to in the brief, "Charge "Collins and credit United States National Bank" (fol. 287), could not possibly refer to the United States National Bank item in question, because in no aspect could that be credited to the United States National Bank. That bank had loaned the money and got re-discounted bills of the California National for it, which it collected when they became due. This transaction as far as that bank was concerned was forever closed. The only possible correction for this item would have been, charge Collins and credit *California National.*

As he says, in January and February he merely went over the general books of the bank to prepare the statement of assets and debts, and did not begin upon Collins' account until April (fols. 310–311, 294–295, 298).

However this may be, he certainly gave the following testimony:

"I discovered those items that you mentioned "towards the end of May" (fol. 259).

"At that time we discovered others. We dis- "covered that credits to Collins' account were on "the bank's guarantee and endorsement of the "bank" (fol. 259).

"Those items were not discussed between Mr. "Pauly and myself while his report was being "made up, only in a general way. He told me to "take that list and check up and see whether it "corresponded. *We didn't know anything about* "*it.*

"*Mr. Wilcox:* Now, I should like to read what "those items were, so that we shall know what the "witness meant when he said the items were dis- "cussed?

"Q. But they relate to these transactions? A. "Yes, sir.

"Q. But they related to these transactions?

"Q. To this $7,500 certificate?

"Q. To the $20,000 item of the Western National "Bank of New York?

"Q. To the $25,000 item of the United States "National Bank of New York?

"Q. To the $10,000 item of the First National "Bank of Chicago?

"Q. And to the other $10,000 of the Western "National Bank of New York?

"*The Witness:* Those items were not discussed "between Mr. Pauly and myself, except in a "general way, he telling me to take that list and "check it up to see whether it corresponded.

"Q. It was discussed in a general way, you say?

"A. *We didn't know anything about it*" (fols. 281–3).

"There was no suspicion in my mind that these "ought to have been charged to Collins. *I did* "*not know anything about it at that time*" (fol. 287).

So that even if he had elsewhere said things to the contrary, the matter would have to go to the jury. It did so go, and the jury has believed the above quoted testimony.

But however this may be—no matter what he himself may have known—he did not tell Mr. Pauly (fol 287). "Nothing at all was said about "it between Mr. Pauly and myself." So that *Mr. Pauly* certainly did not make the discovery, whatever Bloodgood may have done.

It is apparent that for the discovery to be made by anybody the following things must all be known: The loan by the Western National to the California Bank, and the putting of the money loaned to the credit of that bank.

The deposit of the same amount to the credit of Collins.

Knowledge of these facts alone could not occasion the discovery, because it would not appear but what Collins had deposited gold or anything else.

The deposit tag, coupled with the fact that a telegram had passed from Collins to the cashier, is the vital evidence. That shows that the money put to Collins' credit was the Western National money.

In order to prove a discovery by Mr. Pauly, therefore, his knowledge of the deposit tag and the fact that there was a telegram must be shown as well as the loan and the credit, and it must be shown, too, that he knew them all at the same time, so that his attention would be drawn to their connection with each other.

Now, the deposit tag was discovered in May (fol. 259).

"*By the Court:* Q. Do you mean to say that "you had seen and examined the deposit slip "which referred to these transactions of October "13th and 14th, and October 31st, in January? "A. *No;* I took that statement and checked this "account from that statement" (fol. 293).

"When I just testified that those slips were be-"fore me when I made that examination, I was "misled. I may have said so, but I did not under-"stand the question right" (fol. 299).

It does not appear when Mr. Pauly first knew of the fact of the telegram.

It is submitted that the whole matter is a question of fact, which the verdict of the jury has settled.

The question whether Mr. Pauly notified the plaintiff of any act which *may* involve loss "as soon as practicable" is also a question of fact which the verdict has disposed of.

So far as we know there were no such acts except those in issue in this action, and fully discussed above.

The remaining question raised here is as to whether the discovery was made within six months from the "retirement" of the employee from the service of the employer. The argument is that the bank examiner took possession of the assets of the bank on the twelfth of November, and Mr. Pauly did not make his discovery until after the twelfth of May.

The first answer is that the action of the bank examiner certainly did not "retire Collins" from the service of the bank. He was still president,

and continued to be so until his death, on the third of March. Suppose the bank examiner had restored the assets to the bank, would not Collins have still been president?

Mr. Pauly's taking possession—twenty-ninth of December—is too late for this purpose.

But again the jury could, from the evidence, have found that the discovery was made during any day in May—the eleventh for instance—(fols. 257–259), and if that be necessary to sustain the verdict, it has done so.

6. *No fraud or dishonesty on the part of Collins was shown.*

This is on the theory that the account of Collins was used constantly for the benefit of the bank, and, *therefore*, "the inference becomes absolutely "inadmissible (based merely upon the account "itself), that any item in that account represents "a transaction in which Collins used bank moneys "for his own benefit. Any given entry may rep- "resent a Collins transaction, or it may represent "a bank transaction, and this uncertainty *the* "*account itself* is wholly insufficient to clear up."

We had proved that Collins had drawn out all the money. This argument is *that we must prove what he did with it after he had drawn it out.*

In the first place the question as to whether Collins' account was used for bank transactions was one of the issues of fact on which we went to the jury, the trial court charging with the defendant upon that issue (fol. 415), and, of course, the verdict has settled it.

In the next place, assuming that we *have* got to show that it was not used for the bank; *we have*

so shown. Mr. Pauly at the request of the plaintiff in error—sent it to it as early as the eighteenth of July, 1892—a detailed account of all transactions between Collins and the bank, showing that on the eleventh of November, 1891, he owed the bank $374,978.22 (fols. 535–621). *The defendant twice sent its expert to San Diego to investigate this matter. He was given every facility for investigation by Mr. Pauly.* The defendant put that expert upon the stand in the O'Brien case, and we read his testimony, showing the above facts, in this case (fol. 334), *and the result is a criticism on their part of one item of $10,000 out of the $374,978.22* (fols. 325–327). That is all.

The court sent us to the jury on this question, charging with the defendant upon it (fols. 415, 413–14), and the jury has settled it in our favor.

II.

The exceptions to the admission of evidence are the same as in the O'Brien case.

In this connection we call the attention of the Court to a misprint in folio 315—the sentence "We "never had any account of Mr. Collins made up "showing that balance," should be "We never "had any *other* account," etc. O'Brien Record (fol. 383). The evidence in this case was read from the O'Brien case.

The judgment should be affirmed.

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